Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

R.H., by his parents and next friends
Emily and Matthew H.,
Petitioner,

v.

Plano Independent School District,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fifth Circuit held that federal mainstreaming requirements of the Individuals with Disabilities Education Act do not have to be applied to preschoolers in certain circumstances. Since the Third, Seventh, and Tenth Circuits do apply these mainstreaming requirements to preschoolers in those same circumstances, preschoolers with disabilities are no longer equally protected by the law.

Three questions are presented:

1. Under 20 U.S.C. § 1412(a)(5)(A), must a mainstreaming analysis be applied to determine whether a preschooler with a disability can achieve a satisfactory education in the regular class even when there are no regular public preschool classes offered?

2. Under 20 U.S.C. § 1412(a)(5)(A), if a preschool child with a disability can receive a satisfactory education in a regular class, must a school district investigate the mainstream options it has available before placing a child in a more restrictive class?

3. Under 20 U.S.C. § 1412(a)(5)(A), does the statutory preference for public school over private school override a preschool child's substantive right to be educated in his least restrictive environment?

LIST OF PARTIES

The parties in this case are R.H., by his parents and next friends Emily and Matthew H., and Plano Independent School District.

CORPORATE DISCLOSURE STATEMENT

R.H. is an individual.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
LIST OF PARTIES ii
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF CITED AUTHORITIES v
TABLE OF APPENDICES vii
OPINION BELOW 1
STATEMENT OF JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1
Title 20 United States Code § 1400(c)(5)(C). 1
Title 20 United States Code § 1412(a)(1)(A) 2
Title 20 United States Code § 1412(a)(5)(A) 2
Title 20 United States Code § 1412(a)(10)(B)(i). 3
Title 34 Code Federal Regulations § 300.114 (a)(1), (2) 3
Title 34 Code Federal Regulations § 300.115 (a), (b) 4
Title 34 Code Federal Regulations § 300.116(a). 5
Title 34 Code Federal Regulations § 300.118. 5
Title 34 Code Federal Regulations § 300.325(c). 6
STATEMENT OF THE CASE 6
REASONS FOR ALLOWANCE OF THE WRIT 11
I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A MAINSTREAMING ANALYSIS IS REQUIRED 14
A. Avoiding A Mainstreaming Analysis Conflicts With The Mainstreaming Intent Of The IDEA 14
B. The Fifth Circuit Creates A Conflict With Other Circuits In Holding That A Mainstreaming Analysis Is Not Necessary When There Is No Regular Public Class 17
II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A SCHOOL DISTRICT MUST INQUIRE INTO AVAILABLE

REGULAR CLASSROOM OPTIONS WHEN APPROPRIATE 19
III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER THE STATUTORY PREFERENCE FOR PUBLIC OVER PRIVATE PLACEMENTS OVERRIDES A CHILD'S RIGHT TO LRE 21
A. Giving Deference to Public Placements At The Preschool Level Conflicts With The Mainstreaming Requirement Of The IDEA 21
B. The Fifth Circuit Creates a Conflict With Other Circuits In Its Refusal to Utilize Private Preschool Placements 23
CONCLUSION 25
APPENDIX ..... Volume 2
A. May 30, 2006 Amended Opinion of the Hearing Officer of the Administrative Due Process Hearing 2a
B. March 31, 2008 Decision of the United States District Court for the Eastern District of Texas and Associated Report and Recommendation 37a
C. May 27, 2010 Opinion of the United States Court of Appeals for the Fifth Circuit 62a
D. June 10, 2010 Petition for Panel Rehearing to the Court of Appeals for the Fifth Circuit 85a
E. June 25, 2010 Denial of the Petition for Panel Rehearing by the Court of Appeals for the Fifth Circuit 108a

TABLE OF CITED AUTHORITIES

Page

Cases

A.W. v. N.W. R-1 Sch. Dist., 813 F.2d 158, 163 (8th Cir.1987) 15
Board of Educ. v. Rowley, 458 U.S. 176, 207 (1982) .. 14
Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No. 302, 400 F.3d 508, 512 (7th Cir. 2005) 14
Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989) 8, 15, 16, 18
Devries v. Fairfax County Sch. Bd., 882 F.2d 876, 878 (4th Cir. 1989) 15
Greer v. Rome City Sch. Dist., 950 F.2d 688 (11th Cir. 1991) 15
L.B. v. Nebo School District, 379 F.3d 966, 977 (10th Cir. 2004) 15, 18, 24
Oberti v. Bd. of Educ., 995 F.2d 1204, 1215 (3d Cir.1993) 15
Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983) 15
Sacramento v. Rachel H. by Holland, 14 F.3d 1398 (9th Cir. 1994) 15
Sch. Dist. of Wis. Dells v. Littlegeorge, 295 F.3d 671, 672 (7th Cir.2002) 15
T.R. v. Kingwood Township Bd. of Educ., 205 F.3d 572, 577-580 (3d Cir. 2000) 17, 19, 23
School Comm. Of the Town of Burlington v. Department of Educ., 471 U.S. 359, 373 (1985) 21
Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education, 184 F.3d 913, 916-917 (7th Cir. 1999) 24

Other Authorities

The Individuals with Disabilities Education Act Amendments of 1997, 105th Cong. 105-95 (1997) .. 14

Regulations

34 C.F.R. § 300.114 ..... iii, 3, 5
34 C.F.R. § 300.115 ..... 3, 4, 6
34 C.F.R. § 300.116 5
34 C.F.R. § 300.118 ..... 5, 10, 22
34 C.F.R. § 300.149 5
34 C.F.R. § 300.324 3
34 C.F.R. § 300.325(c) 6
34 C.F.R. § 300.38 4
34 C.F.R. § 300.146 20
34 C.F.R. § 300.325 ..... 10, 20

Code

20 U.S.C. § 1400(c)(5)(C) 1
20 U.S.C. § 1412(a)(1)(A) 2, 6
20 U.S.C. § 1412(a)(5) 2, 3, 10, 11, 14
20 U.S.C. § 1412(a)(10)(B)(i) 3, 10, 22
20 U.S.C. § 1415(i)(2)(A) 10
20 U.S.C. § 6301 2
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1291 10

TABLE OF APPENDICES
PETITION VOLUME II

Page

Appendix A **2a**

May 30, 2006 Amended Opinion of the Hearing Officer of the Administrative Due Process Hearing

Appendix B **37a**

March 31, 2008 Decision of the United States District Court for the Eastern District of Texas and Associated Report and Recommendation

Appendix C **62a**

May 27, 2010 Opinion of the United States Court of Appeals for the Fifth Circuit

Appendix D **85a**

June 10, 2010 Petition for Panel Rehearing to the Court of Appeals for the Fifth Circuit

Appendix E **108a**

June 25, 2010 Denial of the Petition for Panel Rehearing by the Court of Appeals for the Fifth Circuit

OPINION BELOW

The Eastern District of Texas affirmed the May 30, 2006 opinion of the hearing officer of the administrative due process hearing. The Fifth Circuit affirmed the March 31, 2008 decision of the United States District Court for the Eastern District of Texas, Not Reported in F.Supp.2d, 2008 WL 906289 (E.D.Tex. 2008) (including the Report and Recommendation of the Magistrate Judge). The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *R.H. v. Plano Independent School District*, 607 F.3d 1003 (5th Cir. 2010). *See* Appendices A-C in Volume II.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Fifth Circuit's opinion was rendered on May 27, 2010. Despite several substantive errors of fact and law, the Petition for Panel Rehearing filed on June 10, 2010 was denied on June 25, 2010. *See* Appendix D and E in Volume II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 20 United States Code § 1400(c)(5)(C).

Findings.

(5) Almost 30 years of research and experience has

demonstrated that the education of children with disabilities can be made more effective by--

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent.

Title 20 United States Code § 1412(a)(1)(A).

Free appropriate public education.

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

Title 20 United States Code § 1412(a)(5)(A).

Least restrictive environment ("LRE").

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the

disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Title 20 United States Code § 1412(a)(10)(B)(i).

Children placed in, or referred to, private schools by public agencies.

In general Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

Title 34 Code Federal Regulations § 300.114 (a)(1), (2).

LRE requirement.

(a) General. (1) Except as provided in §300.324(d)(2) (regarding children with disabilities in adult prisons), the State must have in effect policies and procedures to ensure that public agencies in the State meet the LRE requirements of this section and §§300.115 through 300.120.

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Title 34 Code Federal Regulations § 300.115(a), (b).

Continuum of Alternative Placements.

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under §300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement

Title 34 Code Federal Regulations § 300.116(a).

Placements.

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that--

(a) The placement decision--

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

Title 34 Code Federal Regulations § 300.118.

Children in public or private institutions.

Except as provided in §300.149(d) (regarding agency responsibility for general supervision of some individuals in adult prisons), an SEA must ensure that §300.114 is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

Title 34 Code Federal Regulations § 300.325(c).

Private school placements by public agencies.

Responsibility. Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

STATEMENT OF THE CASE

1. This case involves the Individual with Disabilities Education Act's ("IDEA") requirement that children with disabilities, including preschoolers, are educated with nondisabled children to the maximum extent appropriate. 20 U.S.C. § 1412(a)(1)(A); 20 U.S.C. § 1412(a)(5)(A) (this is also referred to as the IDEA's mainstreaming requirement). In other words, a child must be educated in his least restrictive environment (the extent to which mainstreaming is appropriate for him). *Id.* The IDEA clarifies how to determine to what extent mainstreaming is "appropriate," stating that removal from the regular class should occur only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. *Id.* To this end, states are required to make available a "continuum of alternative placements" which must include "regular classes." 34 C.F.R. § 300.115.

The circuit courts have developed varying yet similar analyses to ensure the mainstreaming requirement of the IDEA is complied with (listed below). These analyses generally consider the accommodations the school district attempted to provide in the regular class, the academic benefit the child can receive from a regular class, the nonacademic benefit the child can receive from a regular class, and whether the child is disruptive to the other students in a regular class. Most circuits also consider in varying degree the cost of educating the child in a regular class, though some circuits do not enumerate this as a mainstreaming factor. While these analyses are used by other circuits to determine whether all children protected by the IDEA ages 3-21 have been mainstreamed in accordance with the law, the Fifth Circuit contends that such an analysis is not appropriate for a certain subset of children: preschoolers living in school districts that do not offer regular public preschool classes.

2. As evidenced by the Individual Education Plan ("IEP") documents in this case, respondent Plano Independent School District ("PISD") offered only one placement for R.H.: a full-time special education placement at a Preschool Program for Children with Disabilities ("PPCD"). The record reveals that PISD is intent on placing preschool children with disabilities in its PPCD classes, whether or not this constitutes the least restrictive environment for a particular child. PISD will not utilize private preschools, claiming it has no control to implement an IEP in a private setting, and it does not discuss with parents or offer any other regular class options for preschoolers available within the district, such as its Early Learning Centers, Head Start, or regular

kindergarten classes. R.H.'s due process complaint alleged he had not been educated in the least restrictive environment.

3. The due process hearing officer blessed R.H.'s placement in a full-time special education class at the PPCD without first making a determination as to whether education for R.H. could be achieved satisfactorily in regular classes with supplemental aids and services. This was a violation of the IDEA's mainstreaming requirement.

The hearing officer's conclusion that "there are no regular classrooms" for preschoolers has proved to be problematic because the Fifth Circuit uses the lack of regular public preschools as a basis for avoiding the application of the IDEA's mainstreaming requirement.[1] While school districts should be given deference with respect to which regular class alternatives are the most feasible and cost-effective to utilize, the fact that there are no public "regular classrooms" in a school district should not give school districts the green light to segregate impressionable young children with disabilities into full-time special education classes.

4. R.H. appealed the hearing officer's decision to the District Court, arguing that a mainstreaming analysis (such as the factors set forth in the Fifth Circuit's *Daniel R.R.*, 874 F.2d at 1044) is necessary

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[1] While there are no free, district operated regular preschools (the compulsory school age is six), there are tuition based district operated regular preschool classes, private regular preschool classes, kindergarten regular classes which can be used for preschoolers for LRE purposes, and Head Start preschool classes.

to guarantee his right to be educated in a regular class if appropriate and it was thus fundamental error to ignore uncontroverted evidence which showed a) the school district took no steps to accommodate R.H. in a regular class before assuming he needed a special education class; b) R.H. obtained educational benefit in the regular education classroom; c) R.H. obtained non-academic benefit in the regular education classroom; d) R.H.'s presence in the regular education classroom did not detrimentally affect the other students in the classroom; and e) there were regular preschool class options close to R.H.'s residence.

5. Logically, it is not possible under the IDEA to determine that a special education class is a child's least restrictive environment without ever asking whether he can receive a satisfactory education in a regular class. However, without ever applying the necessary mainstreaming analysis, the District Court held that R.H.'s full-time special education class mainstreamed him to the maximum extent appropriate and thus was his least restrictive environment.

6. R.H. appealed the District Court decision to the Court of Appeals for the Fifth Circuit. Again without applying a necessary mainstreaming analysis, the Fifth Circuit affirmed the school district's placement of R.H. into a full-time special education class. The IDEA clearly states that a child can be removed from a regular class under only one condition: when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. §

1412(a)(5)(A). The Fifth Circuit creates an exception to this statutory requirement and allows the removal of preschoolers from the regular class even in the absence of this condition being met. The Fifth Circuit permits removal from the regular class based only on the lack of a regular public preschool in the school district and justifies its perceived lack of options by disfavoring private preschool placements,[2] and failing to explore alternative regular class options.

7. The Fifth Circuit's holding that the IDEA's mainstreaming requirement does not apply to preschoolers in school districts which do not operate regular public preschools creates a conflict with the statutory language of the IDEA and holdings of the Third, Seventh, and Tenth Circuits.

8. This case arose from an appeal of a due process hearing pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(i)(2)(A). Thus, the District Court had jurisdiction of the federal claims in the action under 28 U.S.C. § 1331. The Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

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[2] Private school placements are expressly permitted by federal law for fulfilling the least restrictive environment requirements for preschoolers. 20 U.S.C. § 1412(a)(10)(B)(i); 34 C.F.R. §§ 300.118; 300.325(c).

REASONS FOR ALLOWANCE OF THE WRIT

Whether a preschool child with a disability can be placed in a more restrictive setting than necessary under 20 U.S.C. § 1412(a)(5)(A) is an important question on which the circuit courts are split, and on which this Court's guidance is urgently needed. The preschool years present unique challenges and require creative solutions since very few school districts in the United States provide free public preschools. The preschool years are crucial for children with disabilities, and especially for children like R.H. who are high functioning with autism. While the numbers of newly diagnosed infants and toddlers with autism continue to soar, experts warn that early intervention in the areas of self-help, communication, and social skills are crucial. With appropriate role models and intensive early intervention, many of these children can be dismissed from special education programs at an early age to ultimately live independent, self-sufficient lives. However, if segregated at an early age in classes with primarily children not able to serve as role models for these skills and unable to provide appropriate feedback for communication and socialization, the education and sustenance of children with autism can become costly for taxpayers. Such segregation often results in the high costs associated with providing special education until the child is 21 years old, which leads to even greater government assistance as an adult. Moreover, the failure to recognize a child's substantive right under the IDEA to be educated with nondisabled peers to the maximum extent appropriate regresses decades of progress achieved by American jurisprudence.

Four Circuit Courts of Appeal, including the Fifth Circuit in this case, have considered the least restrictive environment obligations school districts have for preschool children with disabilities. Specifically, the Fifth Circuit upheld a special education preschool class as the least restrictive environment without ever determining whether the preschooler could benefit from a regular class. The Third, Seventh, and Tenth Circuits on the other hand, upheld preschools designed for nondisabled children as the least restrictive environment when the preschooler can benefit from a regular class. The Third, Seventh, and Tenth Circuits are appropriately applying IDEA's mandate to provide a regular class and only remove the child to a more restrictive special education class if the severity of the child's disability requires the removal. The Fifth Circuit is missing this mainstreaming intention of the IDEA by only evaluating the options offered by the school district without first determining the child's ability to be mainstreamed.

The split among the Circuits that have ruled on the least restrictive environment issue at the preschool level requires resolution. Parents of preschool children remain uncertain about the rights of their children and whether to incur the expense of enforcing these uncertain rights. Specifically, in some circuits, the courts have held that if a preschooler can be mainstreamed, then a special education class in a hybrid preschool is not appropriate, and the child has a right to be educated in a regular preschool class. The Fifth Circuit, on the other hand, has held that a special education class in a hybrid preschool is mainstream enough regardless of the child's abilities.

School districts are similarly in limbo with respect to how to legally provide a free appropriate public education ("FAPE") in the least restrictive environment to preschool children with disabilities. The needs of children with autism and the least restrictive environment requirement of the IDEA are two of the most commonly litigated areas of special education, and the preschool years present the greatest legal uncertainties. The resources presently expended on litigating the uncertainties regarding these issues would be far better spent on education. In addition, the ramifications of the Fifth Circuit's decision are significant. Left undisturbed, this decision will result in the failure to provide access to regular classes for preschool children with disabilities throughout the Circuit, and in the other circuits that have adopted the Fifth Circuit's mainstreaming analysis.

I. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A MAINSTREAMING ANALYSIS IS REQUIRED

A. Avoiding A Mainstreaming Analysis Conflicts With The Mainstreaming Intent Of The IDEA

The IDEA specifically mandates the placement of children with disabilities in regular education classrooms whenever possible. *Board of Educ. v. Rowley*, 458 U.S. 176, 207 (1982); *The Individuals with Disabilities Education Act Amendments of 1997*, 105th Cong. 105-95 (1997) (statement of George Miller) ("The intent behind [the 1997 Amendments to the IDEA] was to strengthen the least restrictive environment requirement and participation of children with disabilities in the general curriculum and the regular education classroom."). Section 1412 requires that "to the maximum extent appropriate, children with disabilities are educated with children who are not disabled," and that the "removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of the child is such that education in regular classes with the use of supplemental aids and services cannot be achieved satisfactorily." 20 U.S.C § 1412 (a)(5)(A).

The placement of "a child in a school for disabled children runs counter to the policy of the IDEA of 'mainstreaming' disabled children to the 'maximum extent appropriate.'" *Casey K. ex rel. Norman K. v. St. Anne Community High Sch. Dist. No. 302*, 400 F.3d 508, 512 (7th Cir. 2005). Accordingly, school districts

should be required to show that the full range of supplementary aids and services was not only considered, but that accommodating steps were made prior to recommending placement in a more restrictive classroom. School districts should also be required to show that adequate consideration was given to both the academic and nonacademic benefits a child with disabilities will receive from a mainstreamed education.

To this end, several standards have been adopted to determine when a school district may remove a child from a regular educational classroom without violating Congress' mandate for inclusion. *Oberti v. Bd. of Educ.*, 995 F.2d 1204, 1215 (3d Cir.1993); *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1044 (5th Cir. 1989); *Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983); *Sch. Dist. of Wis. Dells v. Littlegeorge*, 295 F.3d 671, 672 (7th Cir.2002); *A.W. v. N.W. R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir.1987); *Sacramento v. Rachel H. by Holland*, 14 F.3d 1398 (9th Cir. 1994); *L.B. v. Nebo School District*, 379 F.3d 966, 977 (10th Cir. 2004); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688 (11th Cir. 1991). These standards are commonly referred to as the *Roncker*, *Daniel R.R.* and *Holland* tests.

The *Daniel R.R.* test was specifically designed by the Fifth Circuit in response to litigation concerning a preschool child with a disability. It has also been adopted by the Third Circuit in *Oberti*, 995 F.2d 1204 and the Tenth Circuit in *Nebo*, 379 F.3d 966. Importantly, the Fifth Circuit in *Daniel R.R.* recognized that:

> the decision whether to mainstream a child must include an inquiry into whether the student will gain any educational benefit from regular education. Our analysis cannot stop here, however, for educational benefits are not mainstreaming's only virtue. Rather, mainstreaming may have benefits in and of itself. For example, the language and behavior models available from nonhandicapped children may be essential or helpful to the handicapped child's development. In other words, although a handicapped child may not be able to absorb all of the regular education curriculum, he may benefit from nonacademic experiences in the regular education environment.

Daniel R.R., 874 F.2d at 1047-58. A refusal to apply this analysis at the preschool level when there is no regular public preschool option derails this protection for the most vulnerable of those individuals for which the IDEA is intended to protect. It makes the *Daniel R.R.* test, developed with respect to the education of a preschooler with a disability, inapplicable to a vast majority of preschoolers in the Fifth Circuit, depending on whether the particular school district funds public preschools. The Third and Tenth Circuits, which have adopted the *Daniel R.R.* test, may similarly withhold the protections this analysis offers from preschoolers with disabilities in school districts that do not fund public preschools. A child's federal right to be mainstreamed to the

maximum extent appropriate should not be dependent on the school district in which the child resides.

B. The Fifth Circuit Creates A Conflict With Other Circuits In Holding That A Mainstreaming Analysis Is Not Necessary When There Is No Regular Public Class

The facts of the Third Circuit's *Kingwood* case, in which Justice Alito wrote the opinion, are strikingly similar to the facts of the present case. *T.R. v. Kingwood Township Bd. of Educ.*, 205 F.3d 572, 577-580 (3d Cir. 2000). In both cases, there was no "regular" public preschool. In both cases, the school district offered a hybrid preschool class: a class designed for children with disabilities that integrated typically developing children. Finally, in both cases, the parents utilized a private preschool to provide the least restrictive environment for their child.

In finding that it is clear under the terms of the IDEA that the hybrid preschool class is more restrictive than a regular fully mainstreamed class, the Third Circuit found such a setting would ordinarily be the least restrictive environment under only two circumstances: 1) if the child cannot receive a satisfactory education in a regular class with supplemental aids and services, or 2) where a regular classroom is not available within a reasonable commuting distance of the child. Importantly, the Third Circuit did not define "regular" as the hearing officer did in the present case to mean a public preschool because the record in that case had already revealed there wasn't one. Rather, the case was

remanded to investigate potential alternative regular classroom placements.

Given the Third Circuit's recognition that a hybrid preschool class may be the least restrictive environment if the child can not receive a satisfactory education in a regular class, it is implicit that such a determination must be made, even as in that case, where there is no regular public preschool option. The Fifth Circuit's refusal to make the determination of whether R.H. could receive a satisfactory education in a regular class (by applying the *Daniel R.R.* test), and placing him directly in the more restrictive special education class without investigating whether regular class options were available, conflicts with the Third Circuit.

Similarly, these facts repeat with the Tenth Circuit case *Nebo*, 379 F.3d 966. There was no regular public preschool, the school district recommended a placement in a hybrid preschool class, and the parents placed their child in a regular private preschool. Here again, despite the lack of a regular public preschool, the Court applied the Fifth Circuit's *Daniel R.R.* test. This analysis revealed that even though some of the child's needs could be met at the hybrid preschool, the hybrid preschool was not the child's least restrictive environment and the school district had accordingly violated the IDEA.

However, despite the application of the Fifth Circuit's *Daniel R.R.* test in *Nebo* where there was no regular public preschool, the Fifth Circuit has held that this very analysis does not speak to a case where there is no regular public preschool. Appendix at 80a.

In the present case, the Fifth Circuit never asked whether R.H. can benefit from a more inclusive setting. The Fifth Circuit assumed, along with the school district, that an IEP can't be implemented in a private setting, but this did nothing to reveal whether R.H. can be mainstreamed, especially since there were other regular class options available.

The Fifth Circuit opinion in the present case directly conflicts with the Third and Tenth Circuits by holding that a mainstreaming analysis is not applicable in the case of a preschooler in a school district with no regular public preschool. The Fifth Circuit eliminates the least restrictive environment protection of the IDEA for preschoolers. Without a mainstreaming analysis, and thus a way to determine a child's least restrictive environment, this protection is lost and preschoolers can be segregated with no explanation.

II. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER A SCHOOL DISTRICT MUST INQUIRE INTO AVAILABLE REGULAR CLASSROOM OPTIONS WHEN APPROPRIATE

As noted above, in *Kingwood*, the Seventh Circuit stated that a hybrid preschool class may be the least restrictive environment even if a child can be mainstreamed if there is no regular classroom available within a reasonable commuting distance of the child. 205 F.3d at 579. Accordingly, the case was remanded to make an inquiry into whether there were regular classroom options available. *Id.* at 581.

In the present case, R.H. argued to the Fifth Circuit in briefing and during oral argument that there existed several regular classroom options, even though there was no regular public preschool. For instance, PISD operates several "Early Learning Centers," which are tuition based regular preschool classes within the local high schools, one of which is located closer to R.H.'s home than the specialized early childhood campus to which PISD restricted him. In addition, PISD has the option of utilizing its regular kindergarten classes to place preschoolers with disabilities. At the age of four, R.H. was reading to his classmates in his private preschool and had an IQ of 127, so being placed with kindergarten students would have been a feasible option to provide him a regular class. Head Start, which is frequently used by school districts to provide a regular class, would have been another option. Finally, R.H.'s private preschool provided a regular class.

However, the Fifth Circuit permitted PISD's assumption that it would not be able to implement an IEP in a private setting claiming it would have no control, despite a public school's obligation under IDEA to oversee the implementation of IEPs when districts place children in private settings. 34 C.F.R. § 300.146; 34 C.F.R. § 300.325(c). In addition, unlike the Seventh Circuit, the Fifth Circuit did not require the school district to explore the other regular class options. Instead, it concluded that since there were no regular public preschools, a more restrictive preschool class was acceptable. Had R.H. resided in the Seventh Circuit, the school district would have been required to explore the numerous options to provide him with a regular preschool class, and his substantive right to be educated with nondisabled

peers to the maximum extent appropriate would have been protected.

III. REVIEW IS NECESSARY TO RESOLVE A CONFLICT CONCERNING WHETHER THE STATUTORY PREFERENCE FOR PUBLIC OVER PRIVATE PLACEMENTS OVERRIDES A CHILD'S RIGHT TO LRE

A. Giving Deference to Public Placements At The Preschool Level Conflicts With The Mainstreaming Requirement Of The IDEA

The Fifth Circuit correctly recognizes that the IDEA "was designed primarily to bring disabled students into the public educational system and to ensure them a free appropriate public education." Appendix at 79a. However, the Fifth Circuit fails to recognize the mainstreaming purpose implicit in this intention. As the Supreme Court has recognized, the Act expressed Congress' concern about "the apparently widespread practice of relegating handicapped children to private institutions or warehousing them in special classes." *School Comm. Of the Town of Burlington v. Department of Educ.*, 471 U.S. 359, 373 (1985). Thus, when the "private" class represents a less restrictive environment and is a regular class of nondisabled peers, the private placement satisfies the substantive intention of the IDEA to end unnecessary segregation. The Fifth Circuit wrongly concludes that the "public" aspect of IDEA supersedes a child's right to be educated with nondisabled peers to the maximum extent appropriate.

For a child who can be mainstreamed, the public K-12 general education classes are usually also the least restrictive environment. However, with pre-K where there is no regular public preschool class, the least restrictive environment may be a private preschool. The Fifth Circuit failed to understand this important distinction with respect to preschool when it stated that "[t]he IDEA [] makes removal to a private school placement the exception, not the default." Appendix at 79a. While this is true, a preschool child in a district with no regular public preschool should be an exception, and the Fifth Circuit's expressed preference for the public environment, whether or not it represents the least restrictive environment, is contrary to the IDEA. The objective of the IDEA is not to have all children with disabilities in public school, it is to achieve the outcome of appropriate education, including further education, employment and independent living in the community.

Thus, at the preschool level, the "public" in FAPE often means publicly funded, and not necessarily operated by the public school district. States and appropriate local education agencies are permitted, under the law, to place children with disabilities in private schools and facilities while providing them with special education and related services in accordance with their IEP, at no cost to their parents, as a means of carrying out the FAPE and LRE requirements. 20 U.S.C. § 1412(a)(10)(B)(i). In fact, 34 C.F.R. § 300.118 specifically states that LRE must be "effectively implemented, including, if necessary, making arrangements with public and private institutions...." The Office of Special Education Programs, which administers the IDEA, expressly

provides that local education agencies that do not operate preschool programs for nondisabled preschool children may use some alternative methods for meeting the LRE requirements including placing children with disabilities in private school programs for nondisabled preschool children.

B. The Fifth Circuit Creates a Conflict With Other Circuits In Its Refusal to Utilize Private Preschool Placements

In the present case, PISD offered only its publicly operated special education class in a Preschool Program for Children with Disabilities. The Fifth Circuit accepted PISD's unsupported contention that R.H.'s IEP could not be implemented in a private setting, even though the parents were doing precisely that – at their own expense. The Fifth Circuit upheld a placement for R.H. in a public class which was more restrictive than his mainstream private class. This is contrary to the Third, Seventh, and Tenth Circuits, which have all found private preschool placements appropriate to provide a least restrictive environment for preschoolers with disabilities.

In *Kingwood*, the Third Circuit acknowledged that New Jersey state law barred the School Board from considering the particular unaccredited private preschool on its continuum of alternative placements while recognizing that if the particular private school at issue was not barred by state law due to lack of accreditation, the Board would have been required to approve the private preschool placement as the one providing a FAPE in the least restrictive environment. 205 F.3d at 580-582.

In *LaGrange*, there was no evidence that the child could not benefit from a more inclusive setting, and the Seventh Circuit held that the private regular preschool in which the parents placed their child was the least restrictive environment. *Board of Education of LaGrange School District No. 105 v. Illinois State Board of Education*, 184 F.3d 913, 916-917 (7th Cir. 1999).

In *Nebo*, the Tenth Circuit applied the Fifth Circuit's mainstreaming analysis which revealed that the child's mainstream private preschool class was the least restrictive environment – not the hybrid public preschool class offered by the school district. 379 F.3d at 978-979.

Yet in the present case the Fifth Circuit found that despite the evidence of R.H.'s success in his regular private preschool and his unique needs and abilities to be educated in a regular classroom, a more restrictive public class constituted the least restrictive environment.

The result of this failure to properly apply the mainstreaming requirement of the IDEA at the preschool level, and instead to allow courts to pick and choose students for which they will apply a mainstreaming analysis based on the public options a district makes available to one or all students, is essentially legalizing discrimination and permitting unequal protection of the laws, which results in frightening long-term implications for this vulnerable demographic and the country as a whole.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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